Supreme Court, U.S.
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No. 98-1702

In The

Supreme Court of the United States

MUMIA ABU-JAMAL,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was petitioner "stripped" of self-representation during voir dire when in fact he continued to represent himself?

(Answered in the negative by the court below).

2. Was petitioner properly removed from portions of his trial when he tried to disrupt the proceedings?

(Answered in the affirmative by the court below).

3. Was petitioner's presence critically required at a conference in chambers where he was represented by counsel, and his counsel agreed to dismiss a juror who had violated sequestration?

(Answered in the negative by the court below).

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ORDERS AND OPINIONS BELOW

The October 29, 1998 opinion of the Supreme Court of Pennsylvania, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998), is reproduced at petitioner's Appendix A. That decision affirmed the ruling of the Philadelphia Court of Common Pleas which denied petitioner's request for collateral relief under the state Post Conviction Relief Act. Petitioner's appendix omits the opinion and factual findings of the Court of Common Pleas.

JURISDICTION

This Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

The version of the state Post Conviction Relief Act in effect in June 1995 (when the petition in issue was filed) stated that an action under the Act "shall be the sole means of obtaining collateral relief[.]" 42 Pa.C.S. § 9542. To be eligible for relief a PCRA petitioner is required to "plead and prove" that conviction resulted from:

> (i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.
>
> (iv) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
>
> (v) A violation of the provisions of the Constitution, law or treaties of the United States which

would require the granting of Federal habeas corpus relief to a State prisoner.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S. § 9543(a)(2).

COUNTER-STATEMENT OF THE CASE

On December 9, 1981, petitioner executed Philadelphia Police Officer Daniel Faulkner by cold-bloodedly shooting him in the face as the officer lay helpless on the ground. Convicted of first degree murder and sentenced to death in 1982, petitioner unsuccessfully appealed to the state supreme court, and then unsuccessfully sought review in this Court. In 1995, petitioner unsuccessfully sought state collateral relief. He again appealed unsuccessfully to the state supreme court. He now, once again, seeks review in this Court.

The evidence presented at trial established that Officer Faulkner stopped a Volkswagen driven by petitioner's brother, William Cook, shortly before 4 a.m. near the corner of 13th and Locust Streets in Philadelphia. The officer was in uniform and was driving a marked police car. Shortly thereafter, at 3:58 a.m., the officer sent a radio

message requesting the assistance of a police van. The officer stood behind Cook and was apparently about to frisk him when Cook turned and punched him in the face. Officer Faulkner attempted to subdue and handcuff Cook. As he did so, petitioner – a former radio reporter turned cab driver after losing his radio job – ran out of a parking lot where his cab was parked on the opposite side of the street. Petitioner ran to the officer, whose back was turned, and shot him in the upper back with a five-shot revolver. The officer turned, grabbed for his own sidearm, and managed to fire one shot that hit petitioner in the upper chest. Officer Faulkner fell to the ground and lay face-up. Petitioner then stood over the officer and deliberately emptied his revolver into the officer's upturned face. One of petitioner's high-velocity "plus P" bullets struck the officer between the eyes and entered his brain (N.T. 6/19/82, 106, 209-216, 276-277; 6/21/82, 4.79-4.106, 5.179; 6/23/82, 6.97; 6/25/82, 8.4-8.34, 8.181; 6/28/82, 28.65).

Officer Robert Shoemaker and his partner, Officer James Forbes, were already on their way to 13th and Locust Streets in response to Officer Faulkner's radio message. A cab driver flagged them down and exclaimed that an officer had been shot. Officer Shoemaker approached the shooting scene with his gun drawn, and saw petitioner sitting on the curb. His right arm was across his chest and his left hand was on the ground beside his leg. Shoemaker said "freeze," but petitioner instead began to reach for something to his left. Shoemaker could not see what it was. He stepped to one side for a better view and saw that petitioner was reaching for a gun with a two-inch barrel that was on the sidewalk

beside him, about eight inches from his hand. When petitioner ignored his second order to "freeze," Shoemaker kicked him and knocked him to the ground, and then kicked the gun out of reach. Officer Forbes covered petitioner's brother, who was frisked and proved to be unarmed. Cook's only comment was, "I ain't got nothing to do with this" (N.T. 6/19/82, 112-119, 127, 150-152, 155).

Officer Faulkner was taken to Jefferson University Hospital. When the police attempted to handcuff petitioner, he violently resisted, swinging his arms with closed fists, striking and kicking the officers as they tried to handcuff him and place him in a police wagon to be transported to the hospital. He continued to struggle against the officers as they brought him inside the hospital, the same one in which doctors were attempting to save Officer Faulkner's life. The officers carrying petitioner temporarily placed him on the floor of the lobby next to the entrance to the emergency room. Petitioner announced, "I shot the mother f___ker and I hope the mother f___ker dies." He then repeated, "Yeah, I shot the mother f___ker and I hope the mother f___ker dies." A hospital security guard who overheard this exclamation described it as boasting: "he was doing everything he could to intimidate the police officers." The guard directed the police to take petitioner through the emergency room to a nearby waiting area, since the officer he had shot was being treated in the emergency room. From there, petitioner was moved to a separate treatment room (N.T. 6/19/82, 176-199, 263-264; 6/21/82, 4.109, 4.194-4.199; 6/24/82, 27-30, 34, 56-61, 67-68, 74, 112-116,

123, 126, 133-136). Shortly thereafter, Officer Faulkner was pronounced dead.

At petitioner's 1982 jury trial, four eyewitnesses who did not know one another testified to his lethal attack on Officer Faulkner. Michael Scanlan was in his car waiting for the light to change at the corner of 13th and Locust Streets, saw Officer Faulkner stop Cook, and saw Cook punch the officer in the face. As the officer tried to subdue Cook, petitioner came "running out from a parking lot across the street towards the officer," whose back was turned (N.T. 6/25/82, 8.4-8.6, 8.11).

> I saw a hand come up, like this, and I heard a gunshot. There was another gunshot when the man got to the policeman, and the gentleman he had been talking to. And then the officer fell down on the sidewalk and the man walked over and was standing at his feet and shot him twice. I saw two flashes.

N.T. 6/25/82, 8.7. Petitioner methodically shot at the officer's face two or three times as he lay helplessly on the ground.

> I could see the one that hit the officer in the face . . . his body jerked. His whole body jerked.

N.T. 6/25/82, 8.8.

Robert Chobert, a taxi driver, had just let off a fare and was filling out paperwork at 13th and Locust Streets, when he heard a shot.

> I looked up, I saw the cop fall to the ground, and then I saw Jamal standing over him and firing more shots into him.

N.T. 6/19/82, 209-210. Mr. Chobert demonstrated how petitioner stood over the fallen officer, methodically firing at his face three or four times (N.T. 6/19/82, 215-216, 276-277).

Cynthia White, a prostitute, was standing on the corner at 13th and Locust Streets, and saw Officer Faulkner stop the Volkswagen driven by Cook. She saw Cook punch the officer in the face. As the officer attempted to handcuff Cook, she saw petitioner run toward the officer from the parking lot on the opposite side of the street. Petitioner shot twice from behind. The officer staggered, grabbed at something at his side, and fell. Petitioner then stood over the fallen officer and fired down at him several times (N.T. 6/21/82, 4.93-4.105; 6/22/82, 5.179).

Albert Magilton did not see the shots fired, but saw petitioner quickly cross Locust Street on his way to shoot the officer. After hearing the shots, he noted that petitioner sat on the curb, which was where arriving officers (who petitioner also tried to shoot) found him (N.T. 6/25/82, 8.75-8.78, 8.98-8.138).[1] Neither petitioner nor his

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[1] Two handguns were recovered from the scene: the gun petitioner had been reaching for, a five-shot Charter Arms .38 caliber revolver with a two-inch barrel; and, from the street, a standard police-issue six-shot Smith and Wesson .38 caliber Police Special revolver with a six-inch barrel. The police gun, which was registered to Officer Faulkner, contained six Remington .38 special cartridges, only one of which had been fired. The Charter Arms two-inch gun, which was registered to petitioner, contained five cartridges, all of which had been fired. All of defendant's ammunition was of the "+P" high-velocity type: four Federal .38 caliber "+P" and one Smith and Wesson

brother, who was present in the courtroom, testified at trial.

The jury found petitioner guilty of murder in the first degree and possession of an instrument of crime. In the penalty phase, the Commonwealth relied largely on its trial evidence. Petitioner was sworn as a witness, but refused to be questioned by his counsel. Instead he made a speech to the jury which included his reading of a

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.38 caliber "+P." The manager of the sporting goods store where petitioner bought the gun explained that the "+P" is known in the trade as a "devastating bullet" . . . "When it hits the target, it just almost explodes" (N.T. 6/19/82, 152-154, 163-164, 176; 6/21/82, 4.32-4.66; 6/23/82, 6.22-6.23, 6.90-6.99).

The bullet that struck petitioner entered his right chest and was surgically removed from his right back. Ballistic testing confirmed that it had been fired from Officer Faulkner's gun. Petitioner's fatal bullet was removed from Officer Faulkner's head. It was too deformed to be ballistically matched to a specific gun, but was caliber .38/.357 (.38 and .357 calibers are interchangeable), consistent with petitioner's .38 caliber handgun. Moreover, the slug had a hollow base, a characteristic of ammunition manufactured by the Federal firearms company; four of the five spent shells in petitioner's gun were of Federal manufacture. A copper bullet jacket, two flattened and distorted bullet specimens, and a number of fragments were also recovered from the shooting scene, all unusable for ballistic matching. However, one of the flattened bullet specimens, like the bullet taken from the murdered officer's head, had a hollow base, as did defendant's Federal brand ammunition. Finally, the fatal bullet had been fired from a gun barrel with eight lands, eight grooves and a right-hand twist; petitioner's gun had eight lands, eight grooves and a right-hand twist, which was consistent with the murder bullet having been fired from his gun (N.T. 6/19/82, 152-155; 6/23/82, 6.2-6.5, 6.101-6.114, 6.163-6.168).

prepared statement in which he claimed he had improperly been denied the right to be represented by one John Africa, a non-lawyer; that his court-appointed attorney conspired with the court and the prosecution; and that the trial was an effort to assassinate him (N.T. 7/3/82, 16).

The jury found one aggravating circumstance (the killing of a police officer acting in the line of duty) and one mitigating circumstance (no significant criminal record), and returned a sentencing verdict of death. The Pennsylvania Supreme Court affirmed the judgments of sentence on direct appeal on March 6, 1989.

Petitioner filed his first petition for *certiorari* in this Court on May 2, 1990. The petition was denied on October 1, 1990. He filed a petition for rehearing on October 29, 1990, which was denied on November 26, 1990. Six months later, on May 15, 1991, petitioner filed a frivolous and untimely second request for rehearing, which was denied on June 10, 1991.

Petitioner made no attempt to file any further appeals for the next four years, though his attorneys had begun work on his petition for state collateral review under the Post Conviction Relief Act (PCRA) some time before August 31, 1990 (N.T. 8/11/95, 57). On June 1, 1995, the Governor of Pennsylvania signed a warrant of execution, which was publicly announced on Friday, June 2, 1995. Petitioner filed his PCRA petition on the following Monday.

Petitioner alleged in that 1995 petition that he would prove his 1982 conviction was the result of a conspiracy, inspired by his supposed fame as a political figure, to

frame him and conceal exculpatory evidence and witnesses. In addition, he raised a variety of more traditional claims, including numerous assertions that his trial and appellate counsel had been ineffective. The evidence at the two-month-long PCRA hearings in July and August of 1995 failed to support petitioner's claims.[2] Indeed, additional evidence of guilt was adduced. In particular, a new eyewitness testified that, although he could not identify the gunman, he saw the gunman lean over and shoot the officer, and then sit on the curb (N.T. 8/2/95, 205-210). This testimony corroborated the Commonwealth's trial evidence showing that it was petitioner who sat on the curb after killing the victim.

On September 15, 1995, the Common Pleas Court issued an opinion with detailed factual findings, and denied PCRA relief. Petitioner appealed to the Pennsylvania Supreme Court. In October 1996, and again in June 1997, the Pennsylvania Supreme Court granted defense motions for further hearings in the Common Pleas Court on claims of newly-discovered evidence.[3] The

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[2] For example, one supposed defense eyewitness was a man who claimed that a large group of police supervisory officials spoke to him at the scene within minutes of the shooting, but then "disappeared"; that the police severely beat petitioner and fractured his skull (petitioner's doctor testified that there was no sign of a beating); that a helicopter orbited the scene (there was no helicopter); and that the victim officer both spoke to and shot petitioner after the officer was already dead (N.T. 6/28/82, 28.58, 28.92-103; 8/4/95, 60-61; 8/11/95, 236-240, 292, 295-297, 299).

[3] The first of these additional hearings concerned a witness called by petitioner at trial in 1982, and again in 1996, who testified on both occasions that she did not see the shooting

Pennsylvania Supreme Court affirmed the denial of PCRA relief on October 29, 1998. From that decision, petitioner now seeks *certiorari*. Review should be denied.

REASONS FOR DENYING THE WRIT

I. PETITIONER WAS PERMITTED TO REPRESENT HIMSELF DURING VOIR DIRE; HIS BACK-UP COUNSEL MERELY CONDUCTED CERTAIN QUESTIONING BY AGREEMENT.

Petitioner claims that he was denied "self-representation at voir dire" (petition at 15). In reality, petitioner represented himself throughout the voir dire, and merely elected to allow his back-up counsel to conduct part of the questioning.

Jury selection proceeded at a snail's pace due to the pro se petitioner's manner of questioning. Further, several prospective jurors appeared fearful or even antagonistic toward him; one explained she could not be fair because he "scares me to death." The prosecutor noted that, after two days, only twenty venirepersons had been questioned, and only one juror had been selected. He was concerned that the selection process could become even more protracted if prospective jurors became reluctant to serve through fear of petitioner. He therefore asked the

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(N.T. 6/29/82, 110-122; 10/1/96, 95). The second hearing concerned the testimony of a prostitute who claimed, *inter alia*, that she had discussed the case with a prosecution eyewitness in March 1997. In reality, that eyewitness had died in 1992 (N.T. 6/26/97, 48-58, 88-89, 91, 104-105, 128, 135; 7/1/97, 18-30, 59-60).

court to take over the questioning for both parties (N.T. 6/8/82, 2.137-2.139; 6/9/82, 3.2-3.4).

The court had discretion to do this under the 1982 Pennsylvania rules of criminal procedure. Pa.R.Crim.P. 1106(c) ("The judge may permit the defense and the prosecution to conduct the examination of prospective jurors or may itself conduct the examination"). As a compromise, however, the court suggested that petitioner might instead wish to allow his back-up counsel, a highly experienced criminal defense attorney, to conduct the defense voir dire (N.T. 6/9/82, 3.4-3.18).[4]

Petitioner objected to the court conducting voir dire, walked away from the sidebar conference where the matter was being discussed, and ordered his back-up counsel not to participate in the proceedings. He announced that he wanted a non-attorney, one John Africa, to question the proposed jurors on his behalf. The court denied this, and indicated that it would review proposed questions for its conduct of the voir dire. Petitioner offered no

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[4] Prior to assisting petitioner, Anthony Jackson, Esq., had tried approximately twenty capital murder cases, resulting in only six convictions and no death sentences (N.T. 7/27/95, 92-93). Prior to that, Mr. Jackson had worked for, and for three years was the director of, the Public Interest Law Center Police Project, where he specialized in claims of police misconduct. He also represented police officers in employment actions against the Police Department (N.T. 7/27/95, 31-34, 95-101, 117-121).

Contrary to petitioner's claim that Mr. Jackson "admitted his lack of preparation" and "never prepared for trial" (petition at 3), the record shows that he conducted thorough and intensive pretrial preparation for a period of five months (N.T. 3/18/82, 9; 7/28/95, 55-59, 67-68). He ceased further efforts only when petitioner insisted on representing himself.

proposed questions, refused to look at the ones submitted by the prosecutor, and instructed his back-up counsel not to look at them. He repeated that he wanted John Africa to conduct the questioning, and stated that he considered court-conducted voir dire a "damned farce" (N.T. 6/9/82, 3.19-3.45).

The court then conducted the voir dire, questioning twelve prospective jurors in what was left of the morning session (N.T. 6/9/82, 3.46-3.105). After the luncheon recess, petitioner instructed his back-up counsel to inform the court that he wanted John Africa to represent him, but that he had agreed to authorize back-up counsel to handle the defense voir dire. The court again declined to allow John Africa to represent petitioner. Petitioner refused to speak when the court asked if he wished to proceed with back-up counsel rather than the court asking the questions. The court invited petitioner to object if his back-up counsel had not correctly represented his preference, and petitioner did not respond. The court therefore allowed back-up counsel to conduct the remaining voir dire (N.T. 6/9/82, 3.106-3.129).

Petitioner, therefore, was not denied self-representation during jury selection. It was his election to have back-up counsel conduct the remaining voir dire rather than have the court conduct the questioning for both sides.[5]

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[5] Petitioner raised a different claim on direct appeal. There, he did not object to the fact that Mr. Jackson conducted the questioning, but rather complained of the trial court's decision to conduct the questioning for both sides under Rule 1106. The state Supreme Court ruled that the trial court did not deny

Petitioner cites no authority for the notion that self-representation precludes the court from conducting voir dire, or is inconsistent with a party agreeing in the alternative to allow his back-up counsel to do so. Instead, petitioner italicizes five words in *McKaskle v. Wiggins*, 465 U.S. 168 (1984), to the effect that a pro se party must be allowed "to participate in voir dire" (petition at 19, emphasis omitted). But petitioner did participate. When the court was conducting voir dire, neither party was allowed to ask questions. (Either party could submit them, but petitioner chose not to). Having elected to allow his back-up counsel to ask questions as an alternative to the court doing so, petitioner regularly conferred with his back-up counsel and decided the exercise of peremptory challenges (*e.g.*, N.T. 6/9/82, 3.143, 3.160, 3.166, 3.197, 3.237, 3.246).[6] This claim is without merit.

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petitioner's right to self-representation by conducting the questioning for both sides, and noted that this situation lasted for only half a day. *Commonwealth v. Abu-Jamal*, 521 Pa. 188, 200-201, 555 A.2d 846, 851-852 (1989), *cert. denied*, 498 U.S. 881 (1990), *r'hng denied*, 498 U.S. 993 (1990), *r'hng denied*, 501 U.S. 1214 (1991). Petitioner abandoned the claim in his first petition for *certiorari*.

[6] After hearing testimony the state post-conviction court found as a fact that petitioner was making his own strategic decisions during voir dire. *Commonwealth v. Abu-Jamal*, 30 Phila. 1 (Phila. Cty. Rptr., September 15, 1995), LEXIS 38; finding of fact 67.

II. PETITIONER WAS PROPERLY REMOVED WHEN HE DISRUPTED THE TRIAL.

Petitioner next complains that he was improperly removed from certain portions of his trial. This claim is also without merit.[7]

On the first day of trial petitioner refused to allow the prosecutor to make an opening statement. He began by insisting – in front of the jury – that he be given a microphone, although no one else was using one:

> THE DEFENDANT: I need a microphone.
>
> THE COURT: I do not have a microphone.
>
> THE DEFENDANT: You can get one, Judge.
>
> THE COURT: Let's go.
>
> THE DEFENDANT: I need a microphone, Judge.
>
> THE COURT: I'm sorry.
>
> THE DEFENDANT: You're sorry?
>
> THE COURT: Mr. McGill [the prosecutor], please.
>
> MR. McGILL: Yes, Your Honor.
>
> THE DEFENDANT: I'm not finished.
>
> THE COURT: Mr. McGill, please.
>
> THE DEFENDANT: I need a microphone.

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[7] Petitioner raised no such claim on direct appeal, nor did he do so in his first petition for *certiorari*.

THE COURT: You don't need a microphone.

THE DEFENDANT: I do need one.

N.T. 6/17/82, 1.45-1.46.

A sidebar conference followed in which petitioner, at length, renewed his motion to be represented by John Africa. The court denied the motion, noting that it had already so ruled. Petitioner replied, "What does that rule mean to me?" (*Id.*, 1.52-1.59). When the court again directed the prosecutor to begin his opening statement, petitioner in front of the jury again demanded that John Africa represent him. The court stated that it had already ruled, to which petitioner responded, "You have not ruled on it to my satisfaction" (*Id.*, 1.69-1.70).

The court repeatedly warned petitioner that he would forfeit his pro se status and might have to be removed from the courtroom if he refused to conduct himself properly, and also warned that it might hold him in contempt. Petitioner responded, "That's absolutely meaningless to me" (N.T. 6/17/82, 1.45, 1.86, 1.110-1.111). After the entire day had been consumed in arguing with petitioner, the court removed him from pro se status (*Id.*, 1.123). Where, as here, a pro se defendant insists on disrupting the trial, the court may require him to proceed through counsel. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) ("the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"); *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) ("when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel").

Despite his removal from self-representation, petitioner's disruptive conduct continued unabated. The following day, the court asked petitioner if the prosecutor could make his opening statement "without any interruptions, please?" Petitioner responded, "Can we proceed with John Africa at the defense table?" (N.T. 6/18/82, 2.86). The court warned petitioner that he would be removed if he further disrupted the trial. Petitioner said, "[T]hat threat is meaningless" (*Id.*, 2.87). After the jury was brought in, petitioner began telling the jurors that the court was "afraid of having John Africa's presence in this courtroom" (*Id.*, 2.88). The court asked the prosecutor to begin his opening statement. Petitioner interrupted:

> THE DEFENDANT: I'm not finished.
>
> THE COURT: We're finished.
>
> THE DEFENDANT: I'm not finished. We are not finished.
>
> MR. McGILL: May I proceed with the opening before this jury that's been waiting for two days?
>
> THE COURT: Yes.
>
> THE DEFENDANT: I don't care.
>
> MR. McGILL: You don't care what?
>
> THE DEFENDANT: I have a right to the defense of my choice.
>
> THE COURT: Let's move the jury out just for a minute.
>
> THE DEFENDANT: This does not mean anything to me. They mean absolutely nothing to me.

N.T. 6/18/82, 2.89.

The court ordered the Sheriff to remove petitioner, explaining that he could be readmitted when willing to conduct himself properly. Petitioner said, "That doesn't mean anything to me. . . . What does that mean to me? That is not news" (*Id.*, 2.90). It was by now after 4 p.m., and so opening statements were delayed, again, until the following day (*Id.*, 2.92).

The following morning, the court asked petitioner if he would behave properly. Petitioner answered, "I sure will, Judge" (N.T. 6/19/82, 4). On the morning of June 22nd, however, petitioner moved to resume pro se status. The court denied this, but petitioner continued to argue in front of the jury, which had to be sent from the room. Two hours were consumed in the ensuing argument. When the court ordered testimony resumed, petitioner refused to sit down and called the judge a "hangman," saying "You can order me thrown out of this courtroom" (N.T. 6/22/82, 5.2-5.4, 5.19-5.21). He was therefore removed again. The jury was instructed to draw no adverse inference from his absence (*Id.*, 5.24). Petitioner was allowed to return in the afternoon session after promising, through his counsel, to behave properly (*Id.*, 5.90).

The following day, petitioner again began addressing the court in front of the jury. The jury was taken out, whereupon petitioner again demanded to be represented by John Africa:

> THE DEFENDANT: I would like to have John Africa represent me.
>
> THE COURT: I know. It's there on the record numerous times. You don't have to put it in

> again. Will you please sit down so we can proceed with the trial?
>
> THE DEFENDANT: Judge, can we proceed with John Africa? Is that at all possible?
>
> THE COURT: No, it's not possible at all.
>
> THE DEFENDANT: Can we proceed with the assistance of John Africa?
>
> THE COURT: No, we can't.
>
> THE DEFENDANT: Why is his assistance expressly denied?
>
> THE COURT: Mr. Jamal, I'm not going to sit here and argue with you time and time.

N.T. 6/23/82, 6.118.

Petitioner repeatedly demanded to be represented by John Africa, repeatedly complained that prior rulings were "not to my satisfaction," repeatedly ignored orders to sit down, and repeatedly ignored the court's warnings that he would be removed if he did not desist. He was ultimately removed again, with the same instruction to the jury (*Id.*, 6.120-129).

The next day petitioner advised the court through his counsel that he would no longer disrupt the proceedings (N.T. 6/24/82, 7). Only minutes later, however, after a witness had been excused following defense cross-examination, petitioner announced "I have some questions," and began attempting to interrogate the witness in front of the jury. The jury was sent out (N.T. 6/24/82, 16-17). Petitioner continued:

> THE DEFENDANT: Judge, I was asking the question in the spirit of proceeding. Obviously I'm not obstructing anything.
>
> THE COURT: Yes, you are.
>
> THE DEFENDANT: Again, I am not.
>
> THE COURT: Yes, you are.
>
> THE DEFENDANT: I would like to protest the continued presence of Mr. Jackson as my defense. He is not my counsel. My counsel is John Africa.

N.T. 6/24/82, 19.

Petitioner told the court, "Judge, you can remove me again and again and again and again and again and again" (N.T. 6/24/82, 85). A short time later, he again began directing questions to a different prosecution witness as the jury was being sent in. He also announced, "I want John Africa to assist me in this matter" (*Id.*, 89-90). He was again removed, with the same cautionary instruction (*Id.*, 95). That afternoon, after speaking with his counsel, petitioner asked counsel to tell the court that he planned to continue to disrupt the proceedings (*Id.*, 129).

The following morning petitioner instructed his attorney to tell the court that he would "do what was right." The court assumed this meant petitioner was promising to act appropriately and allowed him to return (N.T. 6/25/82, 8.2-8.4). Minutes later, however, petitioner stood up and began addressing questions to a witness. When the court told him to sit down petitioner replied, "I'm cross-examining this witness." The jury was taken out. Petitioner accused the judge of "behaving in a way to get me killed"; referring to his counsel, petitioner said, "I

do not want him working here. I want him out of here. I do not want him to participate in this damn sham." Petitioner was removed again, and the jury was again instructed not to draw any adverse inference from his absence (*Id.*, 8.13-8.16).

The court invited petitioner to cooperate at the start of proceedings the following day. The prosecutor pointed out that he was giving up the opportunity to assist in his own defense. Petitioner replied that he did not wish to attend the trial until he had consulted with John Africa (N.T. 6/26/82, 3-7). He was nevertheless readmitted. After the prosecution rested, petitioner addressed the court, at length, demanding to be represented by John Africa instead of a "legal trained lawyer" (*Id.*, 155-159).

The next morning petitioner accused the court of hiding evidence. He announced, "My counsel is John Africa. My counsel would be ordered not to hide anything" (N.T. 6/28/82, 28.46). Petitioner then accused his attorney of "trying to kill me" (*Id.*, 28.47). Disregarding the court's warning, petitioner said he was following "the strategy of John Africa," and told his attorney, "I want you to get your ass up and get out of here. . . . on MOVE!" (*Id.*, 28.48). Petitioner was removed again. The court instructed the jury to draw no adverse inference from his absence (*Id.*, 28.53).

Petitioner returned to court the following day and was asked if he would behave properly. He cryptically replied, "I intend to stay here today." The court deemed this assurance sufficient (N.T. 6/29/82, 3). Petitioner chose not to disrupt the trial during the remaining testimony of defense witnesses.

Although petitioner now claims that he was improperly removed on the above occasions, removal was clearly proper under this Court's controlling decision in *Illinois v. Allen*, 397 U.S. 337 (1970). Petitioner argues that *Allen* is distinguishable because the accused in that case may have had a "diseased mind" (petition at 23). But a defendant is not removed under *Allen* in order to obtain psychiatric treatment, he is removed to prevent the trial from being halted by his misconduct. That petitioner was of sound mind proves only that he intentionally disrupted the trial by his own free will. That may distinguish him from the accused in *Allen*, but not in a way that favors him.

Petitioner seems to suggest that *Allen* does not apply to capital cases (petition at 21), but he offers no legal or logical support for this proposition.[8] He also cites the pre-*Allen* decision in *United States v. Dougherty*, 473 F.2d 1113, 1126 (D.C. Cir. 1972), but that case is inapposite. There, the court held that misconduct occurring after an erroneous denial of self-representation cannot cure the error. Here, the issue is not petitioner's removal from pro se status (which, as explained above, was in any event proper), but rather his removal from the courtroom. As set forth above, in each such instance the misconduct was

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[8] Petitioner cites *United States v. Diaz*, 223 U.S. 442, 32 S.Ct. 250 (1912), in which this Court held that in a non-capital case where the accused is not in custody and voluntarily absents himself after the trial has begun, his unexplained failure to appear operates as a waiver of his right to be present. *Diaz* does not discuss the scenario in which a capital defendant is present but attempts to halt the trial by his own misconduct.

not a subsequent event, but was the direct cause for the removal.

Petitioner complains that, in those periods in which he was removed, he was not put in "a room where he could hear the proceedings," or given a "broadcast system" or "closed circuit television," as supposedly required by *Stewart v. Corbin*, 850 F.2d 492 (9th Cir. 1988), *United States v. Munn*, 507 F.2d 563 (10th Cir. 1974), and *United States v. Washington*, 705 F.2d 489 (D.C. Cir. 1983). But petitioner never requested the devices that he now claims were required; and *Allen* makes no mention of them. Further, none of the above cases stands for the proposition petitioner states.

Stewart v. Corbin upheld the trial court's decision to gag rather than remove the appellant when he refused "to be put in a soundproof room for the remainder of the trial." 850 F.2d at 499. Contrary to petitioner's understanding, it appears the "soundproof" room in that case was not designed for the appellant to hear the trial, but rather to prevent him from being heard. In any case, *Stewart v. Corbin* simply does not imply that a special room is required by *Allen*; nor does the record show that such a room was available in this case. In *Munn* the court merely "noted" that after being removed, "Munn was able to hear the progress of the trial" in the marshall's office "over a building broadcast system." 507 F.2d at 567. The case does not imply that a broadcast system is required by *Allen*, nor did the courthouse in this case (Philadelphia City Hall) have one. *Washington* is even more inapposite. That case merely suggests (in dicta in a footnote) that, where the defendant has *not* been removed but there are "security" issues, the presence requirement

of Fed. R. Crim. P. 43(a) "can" be satisfied "by closed circuit television[.]" 705 F.2d at 497 n.4. *Washington* does not hold that closed circuit television is required to satisfy Rule 43, much less *Allen*, which was not even in issue. Needless to say, there is nothing in the record of this case to indicate that the trial court had reasonable access to a closed-circuit television system.

Petitioner's hindsight theory also fails to identify any specific prejudice from the occasions on which he was removed. *See Foster v. Wainwright*, 686 F.2d 1382, 1388 (9th Cir. 1978) (prejudice requirement implicit in *Allen*), *cert. denied*, 459 U.S. 1213 (1983). The record shows that his counsel made every effort to keep him fully informed of the events at trial:

> [The Prosecutor]: . . . I want the court to know and the record to reflect the continuing effort by Mr. Jackson to represent his client in the best way possible and at the same time have a continual communication between Mr. Jamal and Mr. Jackson without my knowing what it is all about, nonetheless efforts are being made.
>
> So, if Mr. Jamal does not wish to assist in any way with Mr. Jackson he certainly has had the opportunity to speak to him and there were several efforts by Mr. Jackson to obtain his concent [sic] and cooperation in this defense.
>
> MR. JACKSON: I would like to say for the record, Your Honor, that most of the communication has been one way in that aside from Mr. Jamal not wanting to cooperate with me I nevertheless at each instance that he has been brought into the courtroom I have tried to tell him what I intended to do, or when he is not in

> the courtroom either to tell him what has happened or what I intend to do.

N.T. 6/29/82, 5-6.

Finally, it must be noted that no "technological device[ ]" (petition at 13), no matter how advanced, could have given petitioner what he refused to accept. The record makes abundantly clear that petitioner was determined not to cooperate with any "legal trained lawyer" (N.T. 6/26/82, 159), whether he was inside or outside the courtroom.[9] Petitioner is not entitled to relief from his own willful misconduct.

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[9] At the 1995 state post-conviction hearings, at which petitioner claimed that Anthony Jackson was ineffective, Mr. Jackson testified that petitioner "didn't think that the system, the rules, my competence or incompetence, or a lawyer, quite frankly, was going to do him much good" (N.T. 7/27/95, 76). At trial, petitioner repeatedly demonstrated his refusal to cooperate with his attorney. He personally decided what character witnesses would be called on his behalf, refusing to even tell his counsel who these persons were (N.T. 6/24/82, 2-6; 6/25/82, 136). At one point, Mr. Jackson complained that he no longer had copies of witness statements he had given to petitioner, who had apparently refused to return them; Jackson had to ask the prosecutor for additional copies of statements (N.T. 6/26/82, 139-140; 6/29/82, 5-7). On another occasion, as petitioner was conferring with one Janet Africa, he humiliated his counsel by ordering him to leave his presence (N.T. 6/24/82, 2). Petitioner was personally abusive toward his attorney on a number of occasions (N.T. 7/28/95, 167-172).

III. PETITIONER'S ABSENCE FROM A CHAMBERS CONFERENCE IN WHICH HE WAS REPRESENTED BY COUNSEL WAS NOT A DENIAL OF DUE PROCESS.

Petitioner claims he was denied due process of law because he was not personally present at an in-chambers conference in which he was represented by counsel.

The factual background is as follows. On June 18, 1982, prior to the start of trial, the court held an in-chambers conference at which petitioner was not present, in order to discuss how to proceed in light of his removal from pro se status. A juror who had broken sequestration was then discussed. The court crier had informed the judge that, on the previous morning, juror Jeanie Dooley (or Dawley) had complained that her cat was ill. The court did not release her from sequestration because she had a husband at home who could take care of the animal. When told that she could not leave, Ms. Dooley stated "Well, I'm going to go." Later, when court personnel came to take the jury to dinner, Ms. Dooley was gone. She returned at approximately 9 p.m. that evening and stated, "I don't care what Judge Sabo or anybody says, I do what I have to do. Nobody is going to stop me" (N.T. 6/18/82, 2.35-2.39).

Petitioner's counsel agreed with the prosecutor that the court should excuse the roaming juror. Aside from her misconduct, petitioner had visibly alienated her when he had personally questioned her during voir dire; she had been "very belligerent" toward him. Further, she appeared to be mentally unbalanced. Indeed, the prosecutor remarked, without dissent from defense counsel,

that this juror seemed to hate petitioner. For his part, defense counsel made clear that he was pleased to be rid of her (N.T. 6/18/82, 2.40-2.46). At the 1995 PCRA hearing, petitioner offered no evidence to establish that his attorney did not inform him of these events, or that he did not agree with the decision to remove the juror.[10]

In Pennsylvania, sidebars and conferences in chambers are routinely attended only by counsel. In his brief to the Supreme Court of Pennsylvania, moreover, petitioner conceded that there was "no issue concerning [his] right to a fair trial" with respect to the above events (Brief for Appellant, 88-91, n.123). Now, however, petitioner claims that the conference at which the parties agreed to dismiss the prodigal juror was a "critical" event requiring his personal presence, not just that of his counsel. This claim is meritless.

A defendant has a due process right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . . [The] presence of a defendant is a condition of due process to the extent that a fair and just

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[10] Petitioner refers to the court's supposed "enthusiasm" in removing this juror (petition at 7 n.2). There is no trace in the record of this supposed "enthusiasm," notwithstanding the agreement of both counsel. Petitioner also complains that another juror was allowed to be temporarily absent in order to take a civil service examination. That juror, however, was different. He had to be personally present for the examination, unlike Ms. Dooley, whose husband could have taken care of her cat; he asked the court for its cooperation in advance; and both counsel agreed that the juror should be excused to take the examination (N.T. 6/22/82, 5.245-5.246).

hearing would be thwarted by his absence, and to that extent only." *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

Here, petitioner's presence was far from critical. He now complains that the juror in question was personally selected by him during voir dire (as were all the jurors, since petitioner represented himself throughout voir dire). But if this is meant to suggest that there was some kind of bond between petitioner and the juror, the suggestion is not only legally meaningless (petitioner was not entitled to benefit from such bias), but contradicted by the record; the juror apparently detested him. Despite six weeks of hearings on state collateral review, moreover, there is nothing in the record to show that, had petitioner been present, he would not have agreed that it was to his advantage to dismiss the juror; or that the court would not have done so in any event due to her willful violation of sequestration.

The only cases petitioner cites to support his theory either directly contradict it, or are simply inapposite. In *Kentucky v. Stincer*, 482 U.S. 730 (1987), this Court found no denial of due process where the defendant was excluded from a competency hearing with respect to two witnesses. In *Gagnon*, it held that the absence of both the defendants and their attorneys from a conference between the court and a juror did not deny due process.

Finally, contrary to petitioner's understanding, *Hopt v. Utah*, 110 U.S. 574 (1884), did not hold that "challenges to jurors held outside [the] defendant's presence is [a] constitutional violation" (petition at 26). The jury selection claim in *Hopt* was decided under the Criminal Code

of the Utah Territory, not the United States Constitution; and the challenges there occurred out of the presence of the court, the defendant, "and his counsel." 110 U.S. at 577. Here, petitioner's counsel was present. As a matter of law, counsel is "strongly presumed," *Strickland v. Washington*, 466 U.S. 668, 689-690 (1984), to have been acting reasonably when he decided it would be to petitioner's advantage for the juror to be excused. This claim is without merit.

CONCLUSION

Wherefore, the Commonwealth respectfully requests this Court to deny the petition for a writ of *certiorari*.

Respectfully submitted,

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